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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

COLUMBUS EXPLORATION, LLC, et al.,
Petitioners,

v.

MICHAEL WILLIAMSON, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should the Court resolve the existing conflict among the circuits regarding whether the contracting parties' selection of state law as governing their transaction is material in determining whether an intellectual property agreement is a "maritime contract" within the Federal Judiciary's admiralty and maritime jurisdiction under U.S. Const., Art. III, sec. 2, cl. 1?

Does the Court's decision in *Norfolk Southern Railway Company v. Kirby*, 543 U.S. 14, 125 S.Ct. 385 (2004) federalize every intellectual property contract entered into "in connection with a maritime commercial venture," regardless of the adequacy of state law and the lack of a functional need to create a uniform body of federal contract law to govern such transactions?

Does the Court's decision in *Norfolk Southern Railway Company v. Kirby* overrule its prior decisions upholding the contractual freedom of parties to international private agreements to determine the governing law and forum for adjudicating their disputes?

LIST OF PARTIES

The parties before the Court are the Petitioners Columbus Exploration, LLC, Columbus-America Discovery Group, and EZRA. The respondents before the Court include Michael Williamson, Estate of Don C. Craft, Kirk O'Donnell, John Lettow, Timothy McGinnis, Fred Newton, William Watson, Chris Hancock, and Dale Schoeneman.

Pursuant to Rule 14.1(b), Petitioners note that the parties in the court whose judgment is the subject of this Petition are as follows:

Defendant-Appellants and Cross-Appellees: Columbus Exploration, LLC, Columbus-America Discovery Group, Recovery Limited Partnership; Inc., Omni Engineering, Inc., Omni Engineering of Ohio, Inc., Economic Zone Resource Associates, Economic Zone Resource Associates, Ltd., EZRA, Inc., and EZRA of Ohio, Inc.,Econ Engineering Associates, Inc., Thomas G. Thompson, Gilman D. Kirk, James F. Turner, Michael J. Ford, and W. Arthur Cullman.

Plaintiffs-Appellees and Cross-Appellants: Michael Williamson, Estate of Don C. Craft, Kirk O'Donnell, John Lettow, Timothy McGinnis, Fred Newton, William Watson, Chris Hancock, Dale Schoeneman, and International Deep Sea Survey, Inc.

Pursuant to Rule 29.1, Petitioners aver that they do not have any parent companies or any subsidiaries that are not wholly-owned.

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this Petition pursuant to 28 U.S.C. §1254(1). The Second Circuit's opinion was issued on August 22, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend to all Cases of admiralty and maritime Jurisdiction...." Title 28 U.S.C. §1333(1) grants federal district courts original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction."

STATEMENT OF THE CASE

On July 28, 2006, Respondents filed this civil action in the U.S. District Court for the Southern District of New York. Respondents alleged that each had a maritime claim against the Petitioners. Respondents asserted that their claims were based

on the Petitioners' alleged breach of intellectual property protection agreements signed by each Respondent. Each agreement required the contracting Respondent to maintain the confidentiality of the Petitioners' trade secrets and other confidential information, and to refrain from competition.[1]

Petitioners are companies and an individual engaged in the business of developing, applying and marketing trade secrets for exploration and recovery work in extreme environments. Extreme environments involve conditions in which human beings cannot function without artificial protection and assistance. Such extreme environments may include severe temperatures, extreme pressures, the absence of oxygen, exposure to radiation or hazardous chemicals, and other environmental conditions in which humans cannot function without assistance. A primary focus of Petitioners' business is the development of robotic engineering for extreme environments. The trade secrets developed have applications in virtually all extreme environments, from the deep sea, to nuclear power plans, to outer space. To date, the most publicly-recognized innovations by Petitioners have related to the development of the historical data base, mathematical search theory, robotic recovery systems and marketing concepts in the recovery and

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[1]In addition, Respondent Estate of Don C. Craft asserted a penalty wage claim. (Pl Compl, 7-28-06, at ¶ 82). That claim is not the subject of this Petition.

marketing of a famous shipwreck off the coast of South Carolina, the SS *Central America.*[2]

Respondents are individuals who claim to have provided technological assistance, such as the development of computer programs, in the search for the SS *Central America.* Following their work to provide technological assistance, Respondents subsequently executed intellectual property agreements, including non-disclosure/non-compete agreements, on which they based their claims in the proceedings below. Respondents have not denied that the information covered by their intellectual property agreements has broad application to Petitioner's business of developing, applying and marketing trade secrets for exploration and recovery work in extreme environments.

Respondents attached exemplary copies of the intellectual property agreements to their Complaint. Each agreement each states:

> This Agreement shall be governed by Ohio law applicable to contracts between residents of Ohio wholly executed and performed in Ohio. Further, this Agreement contains the full and complete understanding of the parties with respect to the subject matter hereof and supersedes all

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[2] The publicly-documented portion of the effort has received wide national and international acclaim, perhaps most notably in the *New York Times* best-seller, *Ship of Gold in the Deep Blue Sea. See* G. Kinder, *Ship of Gold in the Deep Blue Sea* (Atlantic Monthly Pr 1998).

prior representations and understandings, whether oral or written.

It was undisputed below that each of the individual intellectual property contracts was a non-disclosure agreement, requiring that each Respondent refrain from disclosing trade secrets and confidential information of the Petitioners and from competing with Petitioners. It was also undisputed that each of individual Respondents' contracts stated that it was governed by Ohio state law. Finally, the intellectual property protections created by the agreement were not limited to any particular geographic location or activity.

Simultaneously with filing their Complaints, Respondents sought *ex parte* attachments of the Petitioners' assets within the jurisdiction of the Southern District of New York pursuant to Supplemental Admiralty Rule B. See Fed. R. Civ. P., Supplemental Rule B. The district court granted a writ of attachment on behalf of each of Respondent. It aggregated each of their individual contract claims and authorized an attachment of the Petitioners' property in the total amount of $11,808,600.00. When they finally learned of the *ex parte* attachments more than a month later, Petitioners moved the district court to vacate the attachments. Respondents asserted, among other grounds, that the contracts were not maritime, and that, therefore, the Rule B attachments were improper. Since the Respondents had obtained an attachment based on the purportedly maritime nature of each and every contract, Petitioners asked the district court to vacate the attachments, in whole or in part, based on

the absence of a maritime claim by one or more Respondents.

In its opinion and order dated January 16, 2007, the district court denied the motion to vacate. The district court held that because the "nondisclosure agreements were by their terms entered into in connection with a maritime commercial venture," they "are therefore maritime in nature; thus, the Court has jurisdiction of the claims brought thereunder pursuant to 28 U.S.C. § 1333."

The U.S. Court of Appeals affirmed. It acknowledged the Respondents' contracts as "just standard non-compete, non-disclosure" agreements, *Williamson*, 542 F.3d at 49. But it upheld the "connection with maritime commercial venture" test as the legal standard for determining whether to classify any contract as maritime within the Article III grant of admiralty and maritime jurisdiction. *See id.* Because the agreements have some "connection" with the SS *Central America*, the Court of Appeals concluded that the intellectual property agreements were maritime contracts.

REASONS FOR ALLOWANCE OF THE WRIT

PRELIMINARY STATEMENT

The U.S. district courts have original jurisdiction over "any civil case of admiralty or maritime jurisdiction." 28 U.S.C. §1333. Historically, tort cases are deemed maritime by virtue of their locality; a tort committed upon navigable waters is typically governed by maritime

law. *North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 22 (1919). There is no such litmus test for matters of contract. *Id.*

In *North Pacific*, the Court instructed that the "true criterion" in determining whether a contract is maritime is the "nature of the contract" and "whether it has reference to maritime service or maritime transactions." 249 U.S. at 125.

In *Norfolk Southern Railway Company v. Kirby*, 543 U.S. 14, 125 S.Ct. 385 (2004), the Court recognized that classifying a contract as maritime remains a conundrum for the lower Courts. *Id.* at 23, 125 S. Ct. at 393. The Court reaffirmed *North Pacific* and held that "[t]o ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute . . . [n]or can we simply look to the place of the contract's formation or performance. Instead, the answer depends upon ... the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions." *Kirby*, 543 U.S. at 23-24, 125 S.Ct. at 393 (quotations omitted) (citing *North Pacific S.S. Co.*, 249 U.S. at 125, 39 S.Ct. 221, 63 L.Ed. 510 (1919)). In applying this standard, the Court looked at the "primary objective" of the contracts in question to determine if they possessed an "essentially maritime nature." *Kirby*, 543 U.S. at 24, 125 S.Ct. at 393.

The Court's attention is warranted to address a conflict among the circuits regarding the process

for determining whether a contract possesses an "essentially maritime nature." The existing circuit conflict burs the boundaries of state-federal jurisdiction, provides an open invitation to forum shopping and generates costly and time-consuming litigation. Review is essential in order to address the important federal question of the process for classifying an intellectual property contract as maritime.

I. REVIEW IS NEEDED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE PROCESS FOR CLASSIFYING A CONTRACT AS MARITIME.

The U.S. Courts of Appeals for the Second and Sixth Circuits have developed divergent processes for determining whether a contract has reference to a maritime service or maritime transaction. The Second Circuit holds that a contract is maritime whenever it is entered "in connection with [a] maritime commercial venture." Based on this novel test, the rule in the Second Circuit is that the parties' contractual intent in selecting state law is immaterial, and, instead, that the focus is on whether the contract can be deemed to have a "salty" flavor. *See, e.g., Williamson*, 542 F.3d at 49; *Kalafrana Shipping Ltd. v. Sea Gull Shipping Co.*, No. 08 Civ. 5299 (SAS), 2008 WL 4489790 (S.D.N.Y. Oct. 2, 2008).

In *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413, F.3d 307, 315 (2d Cir. 2005), the Second Circuit relied on *Kirby* to reexamine established precedents on the process for

classifying a contract as maritime. The court stated that the *Kirby* case signaled a "shift in analysis" and that courts must now find any contract with a "primary or principle objective" related to maritime matters to be governed by maritime law. *Id.*

Based upon that same analysis of *Kirby*, the decision below affirmed the novel "connection with maritime commercial venture" test first enunciated by the district court. The decision below held that the district court had properly determined that "the contracts at issue here were 'by their terms entered into in connection with [a] maritime commercial venture and are therefore maritime in nature; thus, the Court has jurisdiction of the claims brought thereunder pursuant to 28 U.S.C. § 1333.'" *Williamson*, 542 F.3d at 49 (quoting *Williamson v. Recovery Ltd. P'ship*, 2007 U.S. Dist. LEXIS 4438, at *6 (S.D.N.Y. Jan. 16, 2007)).

Relying on its expansive view of admiralty jurisdiction over contracts as extending to any and all contracts "entered into in connection with [a] maritime commercial venture," the court below rejected Petitioner's argument that the parties' selection of Ohio state law should be considered in determining whether the contract had "an essentially maritime nature." *Williamson*, 542 F.3d at 49. The decision below indicated that the litmus test was whether the contract was "salty." *Id.*; *Kalafrana Shipping Ltd.*, No. 08 Civ. 5299 (SAS), 2008 WL 4489790.

In light of its novel test, the Court of Appeals' decision gave no weight to the fact that the very

object of the intellectual property agreements was the protection of information (*e.g.*, regarding software and engineering systems, research and development, design, know-how, business methods, etc.). Nor could it have, since, if Respondents sold or released the Petitioners' confidential information or competed in research and development, it would matter little whether the breach benefited a software designer in Manhattan, Kansas or a robotics engineer in Seattle, Washington. Because the value of the Petitioners' information is not tied to geography or a maritime commercial venture, breach of the non-disclosure agreements may be harmful regardless of where and for what purpose.

The decision below failed to perform the functional analysis contemplated by *Kirby*. It did not consider whether there was a functional need to create a uniform body of substantive federal law to govern intellectual property agreements, *Kirby*, 543 U.S. at 27, 125 S.Ct. at 395, or the adequacy of state law in addressing non-disclosure/non-compete issues.

Most recently, the Southern District of New York took one step further along the continuum in *Kalafrana Shipping Ltd.*, No. 08 Civ. 5299 (SAS), 2008 WL 4489790. The court in *Kalafrana* held that a contract for the sale of a vessel is a maritime contract, thus shunning well-settled law to the contrary. *Id.* at *3-*4. *See e.g., S.C. Loveland, Inc. v. East West Towing, Inc.*, 608 F.2d 160, 164 (5th Cir. 1979), *cert. denied sub nom. St. Paul Mercury Ins. Co. v. East West Towing, Inc.*, 446 U.S. 918, 100 S.Ct. 1852, (1980). The case had begun as a simple

breach of contract claim in which one party failed to sell a ship to another party, as promised. *Kalafrana Shipping Ltd.*, No. 08 Civ. 5299 (SAS), 2008 WL 4489790, at *1. In the end, the court held that because the contract was for the sale of a ship, rather than a truck or train, maritime law and remedies were applicable. *Id.* at *3-*4. With this leap, the courts within the Second Circuit have widened the maritime jurisdiction to encompass any contract that is even tangentially related to maritime commerce.

In contrast, the U.S. Court of Appeals for the Sixth Circuit does not follow the "connection with maritime commercial venture" test, and gives primacy to the intention of the contracting parties as to whether their contractual relationship is meant to be maritime or not. *See Cary Marine, Inc. v. Motorvessel Papillon*, 872 F.2d 751, 754-55 (6th Cir. 1989). In *Motorvessel Papillon*, the Sixth Circuit held that the mere fact that a contract relates to a ship or maritime commerce does not support the conclusion that the "subject matter" of the contract is maritime. 872 F.2d at 754-55 (citing *North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 221, 63 L.Ed. 510 (1919)).

In further contrast to the Second Circuit, the Sixth Circuit considers a material factor to be the parties' contractual selection of state law as governing their relationship. *See e.g., National Enterprises, Inc. v. Smith*, 114 F.3d 561 (6th Cir. 1997). The Sixth Circuit Court of Appeals finds maritime jurisdiction applicable for contract matters

when the subject matter of the contract is maritime in nature. *See e.g.*, *National Enterprise*, 114 F.3d at 565; *Motorvessel Papillon*, 872 F.2d at 754-55. In making this determination, the court takes the parties' intentions in forming the contract into account. In *National Enterprises*, the Sixth Circuit indicated that "If the terms of the contract indicate that the parties did not intend for their agreement to be . . . governed by admiralty law, then the exercise of admiralty jurisdiction is not proper." 114 F.3d at 565.[3]

II. ABSENT ACTION BY THE COURT, THE EXISTING CIRCUIT CONFLICT WILL GENERATE COSTLY AND TIME-CONSUMING LITIGATION, BLUR THE BOUNDARIES OF STATE-FEDERAL JURISDICTION, AND PROVIDE AN OPEN INVITATION TO FORUM SHOPPING.

The uncertainty created by the circuit conflict will continue to generate costly and time-consuming litigation on state and federal court dockets throughout the country. Courts choosing to follow the Second Circuit's "connection to maritime commerce" test will consider the range of contracts falling within maritime jurisdiction as virtually boundless when there is some sort of "connection" to

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[3] Like the intellectual property agreements that are the subject of the present Petition, the contract in *National Enterprises* provided that it would "be construed, interpreted and determined *by the laws of the State of Ohio*." 114 F.3d at 565 (emphasis in original).

a maritime commercial venture, regardless of how remote. Those following the Sixth Circuit's focus on the intent of the contracting parties will give weight to the parties' intentions, including their selection of state law.

In its decision below, the Second Circuit indicated that it had "amended" its jurisprudence in *Folksamerica* to reflect what it perceived as a new rule in *Kirby* that "the proper inquiry is whether the principal objective of a contract is maritime commerce...." *Williamson*, 542 F.3d at 49 (citations omitted); *Folksamerica*, 413 F.3d at 315.

In contrast, other circuits have not seen such an "amendment" as necessary. *See, e.g, Puerto Rico Ports Authority v. Umpierre-Solares,* 456 F.3d 220, 224 (1st Cir. 2006) (holding "in determining whether a contract falls within maritime jurisdiction, we focus our inquiry on 'whether the nature of the transaction was maritime,' that is, whether the contract 'relate[s] to the navigation, business or commerce of the sea.'") (citations omitted); *Clements v. Preston,* NO. CIV.A. 05-0209-WS-M, 2005 WL 3371084, at*5 (S.D. Ala. Dec. 12, 2005) (holding "the law is clear that, with respect to contract claims, admiralty jurisdiction exists only if the contract is maritime in nature, that is, if it 'ha[s] reference to maritime services or maritime transactions.') (quoting *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 221, 63 L.Ed. 510 (1919)); *Dockside Development Corp. v. Illinois Intern. Port Dist.*, 479 F. Supp. 2d 842, 846 (N.D. Ill. 2007) ("As the United States Court of Appeals for the Seventh Circuit articulated . . ., 'the

only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce, on navigable waters.... The contract must be wholly maritime in nature, and relate to trade and commerce upon navigable waters.'") (quoting *R. Maloblocki & Associates, Inc. v. Metropolitan Sanitary District of Greater Chicago* 369 F.2d 483, 484-85 (7th Cir.1966) (holding that a contract does not relate directly to navigation simply because its performance "affect[s] navigation"; "the vital question of admiralty jurisdiction is the nature of the transaction")); *Hunsaker v. U.S.*, 66 Fed. Cl. 129, 132 (Fed. Cl. 2005) ("A contract does not sound in admiralty because: '[S]ervices to be performed under the contract have reference to a ship, or to its business, or that the ship is the object of such services or that it has reference to navigable waters .... In order that such character should attach, there must be present a direct and proximate jurisdictional link between the contract and the operation of the ship, its navigation, or its management afloat[.]'") (quoting *Cesaroni v. United States*, 624 F.Supp. 613, 619 (S.D.Ga.1985), aff'd, 780 F.2d 1031 (11th Cir.1985)).

In the view of other circuits, the rule stated in *Kirby* is not novel, but rather a restatement of the holding in one of the pillars of maritime jurisprudence, *North Pacific S.S. Co. v. Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U.S. at 125. From the perspective of those circuits, *Kirby* provides reaffirmation of a well-established principle, not the beginning of a radical expansion of maritime jurisdiction. *See e.g., Dockside Development Corp.*, 479 F.Supp.2d at 846 (stating,

"[t]hough the [*Kirby*] rule seems simple in theory, its application proves to be complicated. This is best illustrated by the oft-cited example that while a contract to repair a ship is maritime, a contract to build a ship is not. Thus, most courts resort to a case-by-case approach, relying heavily on precedent.") (citations omitted). Given the traditionally liberal venue rules in admiralty, litigants will have every incentive to engage in forum shopping, depending on which forum provides the most advantageous version on whether a contract qualifies as maritime or not.

The effects of the Second Circuit's expansion of the universe of contracts considered maritime have already been seen in *Kalafrana*, where the Southern District of New York has relied upon the Second Circuit's *Folksamerica* decision to hold that a contract for the sale of a vessel is a maritime contract. *Kalafrana Shipping Ltd.*, No. 08 Civ. 5299 (SAS), 2008 WL 4489790). This upheaval of the long-standing rule that contracts for the sale of a vessel are not maritime contracts is doubtless only the first major reversal of time-honored maritime law that will result from the Second Circuit's jurisprudence.

The Second Circuit's "amended" jurisprudence also weighed heavily on the present case. Based upon its new view of maritime law, the decision below found that because the contracts in the present matter had a "connection with [a] maritime commercial venture" they were "therefore maritime in nature," or, "salty." *Williamson*, 542 F.3d at 49. Thus, despite acknowledging the contracts as "just

standard non-compete, non-disclosure, and lease contract agreements," *Williamson*, 542 F.3d at 49, the Second Circuit forewent an analysis of how these contracts were critical to "maritime commerce," *Kirby*, 543 U.S. at 23, and simply found them to be maritime in nature due to their "connection" with maritime matters. *Williamson*, 542 F.3d at 49. Given the Second Circuit's extraordinary dilution of the established rules for finding a contract to be maritime in nature, the *Kalafrana* court's decision is not shocking. Once the "connection to commercial maritime venture" is accepted, it is not difficult to see the logic in that circuit's expansion of maritime jurisdiction to any contract that has a "connection" to the sea.

The Second Circuit's "connection with maritime commercial venture" test does not involve a functional analysis of the issues. The test does not undertake to analyze the process for classifying contracts as maritime in terms of the functional considerations that impelled the Constitutional Framers to give admiralty jurisdiction to the federal judiciary, nor to consider the competing interests of the contracting parties, the States, and the United States in determining whether a uniform body of federal contract law should displace state law and the right to trial by jury in each and every contract having any "connection to a maritime commercial venture." *See Kirby*, 543 U.S. at 23, 24-25. *See generally Dockside Development Corp.*, 479 F.Supp.2d 842, 846-47 (noting that "[t]he consistent treatment of . . . contracts [for the lease of dock space] as non-maritime real estate contracts requiring the application of local law rather than

maritime contracts requiring the application of federal law suggests that a purpose of admiralty jurisdiction is to provide a uniform source of law and an unbiased forum for seafaring vessels which cannot be expected to familiarize themselves with the local laws of every state they happen to pass into by way of navigable waters. Where the disputing parties are two local parties that voluntarily and knowingly entered into a contract for land in a particular state, there is no danger of surprise or prejudice that might arise from the application of local law.") (citations omitted). But under the Second Circuit's constitutional test, if a contract has any "connection to a maritime commercial venture," however remote, it is mechanically deemed to be "maritime."

If allowed to stand, the Second Circuit's test would federalize the law of non-disclosure agreements in a broad range of cases. It would dramatically expand maritime jurisdiction at the expense of common law protections of federalism and the right to trial by jury. Under the "connection" test, the category of contracts considered maritime is as limitless as the unbounded range of agreements bearing some kind of "connection" with a maritime venture. Contracts governing the checking accounts by which seaman are paid; agreements to provide for filming a commercial voyage; deals to write a book about a commercial voyage; indeed, even contracts to provide legal representation for a maritime commercial venture-- these, and a virtually limitless range of other agreements, would no longer fall within state jurisdiction-- regardless of the adequacy and appropriateness of state law and jurisdiction in

addressing such matters. The consequences for the erosion of the right to trial by jury and federalism are self-evident. The "connection with maritime commercial venture" test will spawn years of litigation in overturning established precedents, as well as the established expectations of parties to private international agreements.

III. REVIEW IS NEEDED TO ADDRESS THE IMPORTANT FEDERAL QUESTION OF THE PROCESS FOR CLASSIFYING AN INTELLECTUAL PROPERTY CONTRACT AS MARITIME.

The Court's constitutional role in resolving circuit conflicts and providing guidance to the lower courts is especially important as to questions of admiralty jurisprudence. The issue raised here "is one of importance in the development of the law maritime, as to which [the Court] ha[s] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 300 U.S. 411, 415 (1959).

The standard by which contracts are deemed "maritime" under Article III is an important constitutional question. The Seventh Amendment guarantee of the right to trial by jury in cases at common law is denied in admiralty, including cases arising under maritime contracts. *See* U.S. Const. amend. VII. *See generally The Schooner Betsy*, 8 U.S. (4 Cranch) 443 (1807). And because maritime contracts are governed primarily by a uniform body of federal contract law, enlarging the scope of maritime contracts results in the erosion of state law

and federalism. As noted above, the circuit courts are split on the process for determining whether contracts are maritime, warranting the Court's guidance.

The issues presented by the decision below are particularly important because they raise an area of maritime law which the Court has not yet had the opportunity to address: the interstices of intellectual property agreements under state common law, and maritime contracts governed by uniform federal law. The Court has never addressed the process for classifying an intellectual property agreement as maritime. Given the growing importance of technology, trade secrets, know-how and other intellectual property issues in all sectors of modern commerce, the Court has a crucial role in addressing the process for classifying intellectual property agreements as maritime or non-maritime.

Petitioners respectfully submit that traditional non-disclosure agreements governed by state law, such as the ones at issue here, do not become maritime contracts simply because they bear some connection to a maritime commercial venture. By definition, a non-disclosure agreement is an agreement aimed at the protection of trade secrets and intellectual property. It has little or no bearing on the "operation of the ship, its navigation, or its management afloat". *See* 1 *Benedict on Admiralty* § 182 (2008). Confidentiality and non-disclosure agreements do not implicate the United States' interests in a uniform body of federal contract law sufficiently to erode the federalism and the right to trial by jury in cases involve breaches of non-

disclosure agreements. At best, such agreements may sometimes relate "in some *preliminary* manner to maritime affairs," and, as such, they "afford no justification for the application of the uniform admiralty law and are best left for decision under state law contract principles." T. Schoenbaum, *Admiralty and Maritime Law* §1-10 (4th ed. 2004) (emphasis supplied in original).

As to such intellectual property agreements, there are no compelling federal interests in overriding choice-of-law provisions freely adopted by the parties. *See generally The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972) (courts should enforce choice-of-law and choice-of-forum clauses in cases of "'freely negotiated private international agreements.'") Nor are there compelling policy considerations for supplanting existing state laws on the application and enforcement of non-disclosure agreements with a uniform body of federal law.

The conflict among the circuits over the process for classifying contracts as maritime breaks with the intent of the Framers of the Constitution that admiralty law be uniform throughout the nation. See *Kirby*, 543 U.S. at 25, 27, 28, 29. The Court has recognized its constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.'" *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990), (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402-02 (1970).

CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

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07-0548-cv(L)
Williamson v. Recovery Limited Partnership

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2007
(Argued: May 15, 2008 Decided: August 22, 2008)
Docket Nos. 07-0548-cv(L), 07-0746-cv(XAP)

MICHAEL WILLIAMSON, ESTATE OF DON C. CRAFT, KIRK O'DONNELL, JOHN LETTOW, TIMOTHY MCGINNIS, FRED NEWTON, WILLIAM WATSON, CHRIS HANCOCK, DALE SCHOENEMAN, AND INTERNATIONAL DEEP SEA SURVEY, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

RECOVERY LIMITED PARTNERSHIP, COLUMBUS EXPLORATION, LLC, COLUMBUS-AMERICA DISCOVERY GROUP, INC., OMNI ENGINEERING, INC., OMNI ENGINEERING OF OHIO, INC., ECONOMIC ZONE RESOURCE ASSOCIATES, ECONOMIC ZONE RESOURCE ASSOCIATES, LTD., EZRA, INC., EZRA OF OHIO, INC., ECON ENGINEERING ASSOCIATES, INC., DOE E., INC., THOMAS G. THOMPSON, GILMAN D. KIRK, JAMES F. TURNER, MICHAEL J. FORD,

AND W. ARTHUR CULLMAN,

Defendants-Appellants-Cross-Appellees.

Before: CARDAMONS, MINER, and POOLER, Circuit Judges.

William M. Mattes, Dinsmore & Shohl, LLP, Columbus, OH, and William G. Ballaine, Landman Corsi Ballaine & Ford, P.C., New York, NY, for Defendants-Appellants-Corss-Appellees Thompson, Kirk, Turner, Ford and Cullman.

Richard T. Robol and Melanie L. Frankel, Robol Law Office, LPA, Columbus, OH, for Defendants-Appellants-Cross-Appellees Recovery Limited Partnership, Columbus Exploration, LLC Columbus-America Discovery Group, Inc., Columbus Exploration Limited Partnership, Omni Engineering, Inc., Omni Engineering of Ohio, Inc., Economic Zone Resource Associates, Economic Zone Resource Associates, Ltd., EZRA, Inc., EZRA of Ohio, Inc., ECON Engineering Associates, Inc., DOE.E, Inc.

James T. Shirley, Jr. and Michael J. Frebola, Holland & Knight, LLP, New York, NY, for Plaintiffs-Appellees-Cross-Appellants

POOLER, Circuit Judge:

On March 31, 2006, Plaintiffs filed a civil action in the Court of Common Pleas for Franklin County, Ohio, arising out of the same set of facts and circumstances as in this case. On April 24, 2006, Defendants removed the suit to the United States District Court for the Southern District of Ohio on the ground that the dispute was over a maritime contract and thus was governed by federal law. On July 28, 2006, Plaintiffs filed this civil action in the Southern District of New York (Swain, J.), alleging that each Plaintiff had a maritime claim against the Defendants. On the same day, Plaintiffs obtained an ex parte attachment order, invoking Supplemental Admiralty Rule B ("Rule B"). FED. R. Crv. P., ADM. SuPP. RuLE B. On October 18, 2006, the Defendants moved to vacate the attachment. On January 16, 2007, the district court below issued its decision, which 1) vacated the attachment as to the individual Defendants other than Thomas G. Thompson, and 2) denied vacatur as to Defendants Economic Zone Resources Associates, Inc. ("EZRA"), Recovery Limited Partnership ("RLP"), and

Columbus Exploration, LLC ("CXLLC"), but vacated the attachments as to the remaining Defendants, and 3) denied the individual Defendants' requests for an award of compensation, costs, and fees for the wrongful attachment. Defendants appeal the district court's decision, arguing that the district court erred in finding: (1) that the contracts between Plaintiffs and Defendants are maritime contracts, (2) that the notice requirements of Rule B were met, (3) that equitable factors did not weigh in favor of vacating the maritime attachments, and (4) that a Rule 11 hearing was not required. Plaintiffs cross-appeal the district court's decision to vacate the maritime attachments against all Defendants, except Thomas G. Thompson, EZRA, RLP, and CXLLC. Because we agree with all of the district court's determinations, we AFFIRM the judgment of the district court.

BACKGROUND

I. Procedural Background

On March 31, 2006, Plaintiffs filed a civil action in the Court of Common Pleas for Franklin County, Ohio, over the alleged nonpayment of contracts entered into between Plaintiffs and Defendants in connection with the search for the shipwreck *S.S. Central America* in the 1980s. Plaintiffs are individuals who contracted to participate in the *S.S. Central America* search and recovery efforts and a company that supplied side scan sonar equipment to one of the Defendant corporations. Defendants are individuals who were,

or allegedly were, parties to certain contracts or are, or were, directors or officers of one of the Defendant corporations, and several corporations that were allegedly responsible for, and involved in, the search and recovery operation, and the alleged successors and alter-egos of those companies. On April 24, 2006, Defendants removed the suit to the United States District Court for the Southern District of Ohio on the ground that the dispute was over a maritime contract and thus was governed by federal law. On July 28, 2006, Plaintiffs filed this civil action in the Southern District of New York (Swain, J.), alleging that each Plaintiff had a maritime claim against the Defendants. Plaintiffs immediately obtained an ex parte order for the issuance of a writ of attachment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules"). FED. R. Civ. P., ADM. SUPP. RULE B. On October 18, 2006, the Defendants moved, through an order to show cause, to vacate the writ and the attachment achieved under the writ, to dismiss the complaint, and for attorneys' fees and costs incurred in connection with the application. The district court, pursuant to Rule E of the Supplemental Rules, heard arguments on the matter and received pre-and post-hearing briefs and evidentiary submissions. FED. R. Civ. P., ADM. SUPP. RULE E(4)(f). On January 16, 2007, the district court issued its decision, which (1) vacated the attachment as to the individual Defendants other than Thomas G. Thompson, and (2) denied vacatur as to Defendants EZRA, RLP, and CXLLC,

but vacated the attachments as to the remaining corporate Defendants, and (3) denied the Defendants board members' request for an award of compensation, costs, and fees for the wrongful attachment. Defendants timely filed their notice of appeal, and Plaintiffs cross-appealed the district court's decision to vacate certain attachments.

II. Facts

Plaintiffs assisted Defendant Thompson, at various times between 1986 and 1988, in the location and recovery of the *S.S. Central America,* a United States Mail steamship that sank off the coast of South Carolina in 1857. As part of the compensation offered to Plaintiffs for their assistance on the project, Plaintiffs and Thompson entered into non-disclosure and non-compete agreements that gave Plaintiffs rights to a fraction of a percentage of the total recovery of the shipwreck -- i.e., the gross value of gold, silver, and valuable artifacts recovered from the shipwreck. The individual Plaintiffs were members of Defendant Thompson's "team" that first imaged the *S.S. Central America* in 1986, confirmed that the wreck was in fact the S.S. *Central America* in 1988, and recovered the gold, silver, and other artifacts from the ship. Additionally, Plaintiffs allege that one of the Plaintiffs, International Deep Sea Survey, Inc. ("IDSS"), leased a side sonar to one of the Defendants, Recovery Limited Partnership ("RLP"), in 1986. As part of the agreement between IDSS and

RLP, IDSS also agreed to be compensated, in part, based on the percentage of the net recovery of the operation.

In May 1987, the United States District Court for the Eastern District of Virginia ordered the arrest of the ship, took constructive possession of the ship and everything on it, and entered an order requiring any person asserting an interest in the S.S. *Central America* to file a claim before the 1992 cut-off date. At present, all of the litigation concerning the *S.S. Central America* in the Eastern District of Virginia has been completed; Defendants have obtained their portion of the treasure and have sold it. Throughout this process, Defendants wrote letters to Plaintiffs assuring them that Plaintiffs would receive their share of the total recovery after Defendants completed the process of selling the treasure. However, as time passed, Plaintiffs realized that the sale of the treasure had, in fact, been completed, and that nonetheless Defendants still had not compensated Plaintiffs. The lawsuit it the Court of Common Pleas in Ohio followed.

Despite the fact that gold and valuables were certainly recovered from the S.S. *Central America,* it is undisputed that Defendants have never provided Plaintiffs with any percentage of the total recovery. Plaintiffs allege that Defendants have therefore violated the contracts between Plaintiffs and Defendants and that Plaintiffs are owed a portion of the total recovery. Defendants, on the other hand,

argue that, while gold and valuables were certainly found on the ship, the recovery efforts did not actually provide a return to the initial investors, much less a profit, and that Defendants therefore have not violated their contract with Plaintiffs. Furthermore, Defendants argue that Plaintiffs erred in failing to bring their claims before the Eastern District of Virginia and that the Plaintiffs are bound by the prior orders and decrees of the district court in Virginia.

DISCUSSION

Defendants' appeal raises numerous issues. First, Defendants argue that the contracts between Defendants and Plaintiffs are not maritime contracts, and therefore (1) federal jurisdiction does not apply, and (2) prejudgement attachment is not proper in New York, given that the primary proceeding is pending in Ohio. Second, assuming the contracts are maritime contracts, Defendants argue that the Plaintiffs failed to comply with the requirements of notice and personal service for Rule B attachments. Third, again assuming the contracts are maritime contracts, Defendants argue that the ex parte maritime attachments of certain Defendants' assets were improper in view of the equitable circumstances of the case. Fourth, Defendants argue that the district court erred in refusing to hold a hearing, pursuant to Rule 11 of the Federal Rules of Civil Procedure, to determine whether

Plaintiffs should be sanctioned for filing the ex parte attachment order. Fifth, on cross-appeal, Plaintiffs argue that the district court erred in vacating the attachments against all Defendants except Thompson, EZRA, RLP and CXLLC.

We review a district court's decision to vacate a maritime attachment for abuse of discretion; however, we review de novo any legal determinations on which this discretion rests. Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 439 (2d Cir. 2006).

I. The Contracts are Maritime Contracts

Maritime attachment is a prejudgement mechanism used by parties in admiralty cases to secure jurisdiction over an absent party and to obtain security for potential judgment where the absent party's assets are transitory. Id. at 436. Maritime attachment is a unique aspect of admiralty jurisprudence that has deep historic and constitutional roots. Id. at 437-38.

> Maritime attachments arose because it is frequently, but not always, more difficult to find property of parties to a maritime dispute than of parties to a traditional civil action. Maritime parties are peripatetic, and their assets are often transitory. Thus, the traditional policy underlying maritime attachment has been to permit the attachments of assets wherever they can be

> found and not to require the plaintiff to scour the globe to find a proper forum for suit or property of the defendant sufficient to satisfy a judgment.

Id. at 443 (citations omitted). However, because prejudgement attachment is such a severe remedy, it is important to first determine whether a contract is, in fact, a maritime contract warranting maritime attachment. We review de novo the district court's conclusion that the contracts at issue are maritime contracts. Id. at 439.

Because the case law regarding the distinction between maritime and non-maritime contracts was somewhat confused, the Supreme Court clarified, in Norfolk Southern Railway Company v. James N. Kirby Pty. Ltd., 543 U.S. 14 (2004), the appropriate approach for making such a determination.

> To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. Nor can we simply look to the place of the contract's formation or performance. Instead, the answer depends upon . . . the nature and character of the contract, and the true criterion is whether it has reference to maritime service or maritime transactions.

Norfolk S. Ry. Co., 543 U.S. at 23-24 (internal quotation marks and citations omitted). In accord

with the Supreme Court's ruling in this case, we recently amended our jurisprudence on maritime contracts, recognizing that the proper inquiry is "whether the principal objective of a contract is maritime commerce, rather than ... whether the non-maritime components are properly characterized as more than `incidental' or `merely incidental' to the contract." Folksamerica Reinsurance Co. v. Clean Water of N.Y., Inc., 413 F.3d 307, 315 (2d Cir. 2005) (internal quotation marks and citation omitted).

Here, the contracts reference maritime service or maritime transactions. The contracts concern: non-compete agreements, whereby the hired workers promised not to work on the waters off the shore of the Carolinas in exchange for a portion of the proceeds from a potential recovery effort of a shipwreck in the ocean; non-disclosure agreements, whereby the hired workers promised not to discuss the work they were doing on a ship in the Atlantic Ocean; and the lease of equipment for use in the search for the *S.S. Central America* in the Atlantic Ocean. While the Defendants may be correct in stating that these are just standard non-compete, non-disclosure, and lease contract agreements, they are incorrect in arguing that the contracts are therefore not maritime contracts. As the Supreme Court explained, a conceptual analysis is appropriate. See Norfolk S. Ry. Co., 543 U.S. at 22-25. We must "focus[] our inquiry on whether the principal objective of a contract is maritime commerce," id. at 25, and we must look to the "nature and character of the contract," id. at 24. Here, the

nature and character of these non-compete and non-disclosure agreements, as well as the agreement to provide technical equipment in exchange for a percentage of the recovery, are clearly "salty." Id. at 22. As the district court correctly found, the contracts at issue here "were by their terms entered into in connection with maritime commercial venture and are therefore maritime in nature; thus, the Court has jurisdiction of the claims brought thereunder pursuant to 28 U.S.C. § 1333." Williamson v. Recovery Ltd. P'ship, 2007 U.S. Dist. LEXIS 4438, at *6 (S.D.N.Y. Jan. 16,

2007).

Defendants also argue that the choice-of-law provision in the contracts, selecting Ohio law, governs the contracts such that they cannot be analyzed under maritime law.[1] Defendants misapprehend the state of the law. As the Supreme Court explained, the first step of the analysis is determining whether something is a maritime contract; then, once a contract has been deemed a maritime contract, the next step is determining whether a specific state's laws should be used to supplement any area of contract law for which federal common law does not provide. See Norfolk S.

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[1] It is worth noting, as Plaintiffs-Appellees point out, that this argument seems particularly disingenuous, because it was Defendants, themselves, who initially removed this case from the Ohio Court of Common Pleas to federal district court on the ground that it involved a maritime contract and thus should be tried in federal court.

Ry. Co., 543 U.S. at 27 (emphasis added). The fact that a choice-of-laws provision exists in a contract does not, by itself, remove the contract from the scope of maritime law. We therefore affirm the district court's determination that the contracts at issue here are maritime contracts and that the dispute is properly in federal court.

II. The Plaintiffs met the notice and service requirements necessary for a Rule B Attachment

Defendants next argue that even if the contracts are maritime contracts, and prejudgement attachment in New York is theoretically appropriate, the Plaintiffs here failed to meet the requirements for notice and service necessary under Rule B. We review de novo the district court's conclusion that the Plaintiffs complied with the requirements of Rule B. See Aqua Stoli, 460 F.3d at 439.

Because admiralty and maritime proceedings are such a unique aspect of United States law, the Supreme Court has been responsible for promulgating uniform rules to govern such proceedings. Id. at 438. Since these rules were first established in 1844, they have been revised and amended numerous times. Id. The process by which a party may attach another party's assets is currently governed by Rule B. "If a defendant is not found within the district . . . a verified complaint may contain a prayer for process to attach the

defendant's tangible or intangible personal property -- up to the amount sued for -- in the hands of garnishees named in the process." FED. R. Crv. P., ADM. SuPP. RULE B(1)(a). Then, "[t]he court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order." Rule B(1)(b). "The order of attachment may be requested and granted ex parte, though notice of the attachment to the defendant via appropriate service is required." Aqua Stoli, 460 F.3d at 438 (internal citations omitted).

Defendants argue that the order and writs of attachment should be vacated because Plaintiffs failed to give them prompt notice of the attachment as required by Rule B. However, as Plaintiffs explain in their brief, they made the Defendants aware of all the attachments as soon as they became aware of them. The district court further found that "the record demonstrates that notice of the actual attachment achieved pursuant to the writ has been given promptly upon Plaintiffs becoming aware of the attachment of particular assets. This is sufficient compliance with the notice requirement of Supplemental Rule B." Williamson, 2007 U.S. Dist. LEXIS 4438, at *7. Because we agree with the district court that Plaintiffs provided prompt notice to the Defendants, and therefore met the

requirements of Rule B, we affirm the decision of the district court.

III. The Attachments here are not subject to vacatur for equitable reasons under Aqua Stoli Shipping

Defendants argue that, assuming the contract is a maritime contract and that service and notice were proper, the attachments should be vacated for equitable reasons. We review a district court's decision whether to vacate a maritime attachment order for abuse of discretion. Aqua Stoli, 460 F.3d at 439.

After the requirements of Rule B have been met, and attachment has occurred, defendants have the opportunity under Rule E(4)(f) to contest the attachment of their property before the district court. FED. R. CN. P., ADM. SuPP. RULE E(4)(f); Aqua Stoli, 460 F.3d at 438. Despite our general policy of allowing maritime attachments, we have nonetheless found that, even when a plaintiff meets the procedural requirements for obtaining a maritime attachment, the district court may nonetheless vacate such an attachment for equitable reasons. "Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to [the property owner] a prompt post-seizure hearing at which [the property owner] can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings." FED. R. Civ. P., ADM. SuPP. R.

E(4)(f), Advisory Committee's Note to 1985 Amendment. We have elaborated on the appropriate inquiry under Rule E(4)(f), explaining that an attachment should issue only if a plaintiff establishes four factors: (1) that the plaintiff has a valid prima facie admiralty claim against the defendant; (2) that the defendant cannot be found within the district; (3) that the defendant's property may be found within the district; and (4) that there is no statutory or maritime law bar to the attachment. Aqua Stoli, 460 F.3d at 445. We have stated that even if a plaintiff satisfies the requirements of Rules B and E, vacatur is still appropriate in "other limited circumstances." Id For example, an attachment may be vacated if the defendant demonstrates "at the Rule E hearing that 1) the defendant is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain in personam jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise." Id.

Plaintiffs met the requirements of Rules B and E as to Defendants Thompson, EZRA, RLP, and CXLLC. Furthermore, contrary to Defendants' assertions, Aqua Stoli does not support an argument that the district court abused its discretion in refusing to vacate these attachments on the additional grounds discussed in Aqua Stoli. These Defendants are not located in New York and thus are not subject to suit in a convenient adjacent

jurisdiction. Moreover, Defendants have not demonstrated that they are subject to personal jurisdiction in the districts where the Plaintiffs are located and Plaintiffs have not yet obtained sufficient security for potential judgment. Furthermore, contrary to Defendants' assertions, a district court errs "when it relie[s] on a needs test and a hardship balancing" in evaluating whether a maritime attachment was equitable. Id. at 447. We therefore find that the district did not abuse its discretion in refusing to vacate the attachment for equitable reasons.

IV. Defendants argument that a Rule 11 sanctions hearing was required is meritless

Rule 11(c) of the Federal Rules of Civil Procedures allows the court to sanction a party, if the court determines that the party has violated Rule 11(b) by making false, misleading, improper, or frivolous representations to the court. FED. R. Crv. P. 11. Under this rule, a district court may sanction a party sua sponte or in response to a motion for sanctions. FED. R. Crv. P. 11(c). "A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." FED. R. C1v. P. 11(c)(2).

Because Defendants failed to make a separate motion for sanctions under Rule 11, and therefore failed to comply with the procedural requirements of the rule, the district court denied the Defendants'

request for attorneys' fees, costs, and damages. Williamson, 2007 U.S. Dist. LEXIS 4438, at *13. On appeal, Defendants-Appellants acknowledge that they failed to meet the procedural requirements for a Rule 11 hearing. Nonetheless, Defendants argue that their failure to meet the procedural requirements should be ignored, because "this case presents unusual circumstances" and that "a separate Rule 11 motion would have been impractical and merely duplicative." They, however, cite no law to support such an argument, and we find no legal basis to support their argument. We therefore affirm the district court's decision that a Rule 11 hearing was not required, because the Defendants failed to meet the procedural requirements of Rule 11(c).

V. The District Court did not abuse its discretion in deciding to vacate the marine attachment order as to certain Defendants

We review a district court's decision to vacate an attachment order for abuse of discretion. Aqua Stoli, 460 F.3d at 439. Here, the district court vacated the attachments as to certain Defendants, finding that Plaintiffs failed to make out a prima facie case as required under Rule B. The district court explained: "Plaintiffs' allegations regarding the liability of the other corporate entities are supported merely by generalized assertions in the attorney-verified complaint in this action, unsworn court filings in related actions, and documentation

showing common business addresses and management. On this record, Plaintiffs' showing is insufficient to make out the requisite prima facie admiralty claim based on the [non-disclosure agreements] against Defendants other than Thompson and ... RLP, EZRA, and CXLLC." Williamson, 2007 U.S. Dist. LEXIS 4438, at *9-*10. Plaintiffs argue that the district court, in determining whether to vacate the attachment, engaged in an impermissible fact-intensive inquiry by looking beyond the requirements of Rule B. See Aqua Stoli, 460 F.3d at 447 (stating that a fact intensive inquiry is improper because Rule B specifies the sum total of what must be shown for a valid maritime attachment").

Superficial compliance with Rule B, while necessary, is not sufficient in determining whether maritime attachment is appropriate Where a defendant contests an attachment of its property under Rule E(4)(f), plaintiffs must demonstrate at the Rule E hearing why the attachment should not be vacated. FED. R. CIV. P., ADM. SUPP. RULE E(4)(f). While Rule E(4)(f) does not explain under what circumstances the district court may vacate the judgment, and we have not yet had occasion to determine the full scope of a district court's vacatur power, Aqua Stoli, 460 F.3d at 445, the district court may certainly vacate the judgment if it determines, after hearing from both parties,

that the requirements of Rule B have not actually been met. Id. Contrary to Plaintiffs' assertions, that is exactly what the district court did here. The district court did not engage in additional fact finding in the Rule E hearing, after determining that the requirements of Rule B and E had been met. Rather, the district court found that Plaintiffs failed to make out the prima facie case required under Rule B for certain Defendants. This is an entirely appropriate basis on which to vacate an attachment. See id.

The district court held that Plaintiffs failed to make out the requisite prima facie admiralty claim against Defendants other than Thompson, RLP, EZRA and CXLLC. As to the other individual Defendants, the district court found that one statement made by Thompson in 1999 --that he had the authority to speak for investors and partners, but not identifying the individuals to whom he referred -- "is insufficient to constitute the requisite Aqua Stoli showing of a prima facie admiralty claim against the defendants other than Thompson." Williamson, 2007 U.S. Dist. LEXIS 4438, at *9. The district court was also not persuaded by the Plaintiffs' additional evidence, a verified complaint by the Plaintiffs to this same effect, particularly because the individual Defendants also proffered affidavits in support of their vacatur application specifically denying any contractual relationship with the Plaintiffs and denying that Thompson was authorized to bind them. Id. We agree with the

district court that this evidence is not sufficient to meet the requirements for a prima facie admiralty claim under Rule B. We therefore find that the district court did not abuse its discretion in vacating the attachments as to all individual Defendants other than Thompson.

Plaintiffs argued that other corporate entities, beyond RLP, EZRA, and CXLLC, were also liable to Plaintiffs under a theory of "piercing the corporate veil." See Kirno Hill Corp. v. Holt, 618 F.2d 982, 985 (2d Cir. 1980) (stating that the concept of "piercing a corporate veil" applies in the context of maritime law). "The prerequisites for piercing a corporate veil are as clear in federal maritime law as in shoreside law: [The individual] must have used [the corporate entity] to perpetrate a fraud or have so dominated and disregarded [the corporate entity]' s corporate form that [the corporate entity] primarily transacted [the individual]'s personal business rather than its own corporate business." Id. To determine whether an individual so dominated and disregarded a corporate entity's corporate form, a court may consider several factors, including: "(1) the intermingling of corporate and personal funds, (2) undercapitalization of the corporation, and (3) failure to maintain separate books and records or other formal legal requirements for the corporation." William Wrigley Jr. Co. v. Waters, 890 F.2d 594, 600 (2d Cir. 1989) (citations omitted). There is no set rule as to how many of these factors must be present to warrant piercing the corporate veil and courts have

considered additional factors as well. Id. at 600-01. Instead of a firm rule, the general principle guiding courts in determining whether to pierce the corporate veil "has been that liability is imposed when doing so would achieve an equitable result." Id. at 601.

The district court vacated the attachments as to these remaining corporate Defendants because it found that, again, the Plaintiffs failed to make out the requisite prima facie admiralty claims as to these Defendants. Williamson, 2007 U.S. Dist. LEXIS 4438, at *10. Specifically, the district court stated that "[p]laintiffs' allegations regarding the liability of the other corporate entities are supported merely by generalized assertions in the attorney-verified complaint in this action, unsworn court filings in related actions, and documentation showing common business addresses and management." Id. at *9. We agree with the district court and find that it did not abuse its discretion in vacating the attachments against these remaining corporate Defendants, based upon the evidence before it. As the district court noted, this decision does not mean that Plaintiffs' allegations, if proven, are insufficient to prove mismanagement, breach of duty to investors, and misuse of corporate entities as to these other corporate Defendants; rather, it means that the evidence provided to the district court is "insufficient at this stage to demonstrate that Plaintiffs have the requisite prima facie admiralty claim against any defendants other than Thompson, EZRA, RLP and CXLLC." Id. at * 12-*

13.

Finally, the district court also dismissed an attachment insofar as it was based, in part, on a penalty wage claim asserted by the Estate of deceased Plaintiff Craft, pursuant to 46 U.S.C. § 10504, against Defendant Kirk. Id. at *11. Again, the district court found that the only evidence provided by Plaintiffs to support this theory -- a hearsay statement in a published book -- was not sufficient to make out a prima facie admiralty claim. We again agree with the district court and find that it did not abuse its discretion in vacating such an attachment on this evidence.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 06 Civ. 5724 (LTS)(FM)

MICHAEL WILLIAMSON, THE ESTATE OF DON C. CRAFT, KIRK O'DONNEL, JOHN LETTOW, TIMOTHY MCGINNIS, FRED NEWTON, WILLIAM WATSON, CHRIS HANCOCK, DALE SCHONEMAN, and INTERNATIONAL DEEP SEA SURVEY, INC.

Plaintiffs,

-v-

RECOVERY LIMITED PARTNERSHIP, COLUMBUS EXPLORATION, LLC, COLUMBUS-AMERICA DISCOVERY GROUP, INC., COLUMBUS EXPLORATION LIMITED PARTNERSHIP, OMNI ENGINEERING, INC., OMNI ENGINEERING OF OHIO, INC., ECONOMIC ZONE RESOURCE ASSOCIATES, ECONOMIC ZONE RESOURCE ASSOCIATES LTD., EZRA, INC., EZRA OF OHIO, INC., ECON ENGINEERING ASSOCIATES, INC., DOE.E, INC., THOMAS G. THOMPSON, GILMAN D. KIRK, JR., JAMES F. TURNER, MICHAEL J. FORD, JR., and W. ARTHUR CULLMAN, JR.

Defendants.

MEMORANDUM OREDER

This is a dispute arising from alleged nonpayment under contracts entered into in connection with the search for the *S.S. Central America* shipwreck in the mid-1980s. The effort to recover treasure from the wreck, and the contractual relationships of the parties here, are also the subject of other litigation. On or about July 28, 2006, in the emergency part of this Court, Plaintiffs obtained an ex parte order for the issuance of a writ of attachment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Admiralty Supplemental Rules") authorizing the attachment of assets of each of the defendants in the amount of $11,808,600. By order to show cause signed on October 16, 2006, Defendants seek vacatur of the writ and the attachments achieved thereunder, dismissal of the complaint, and attorneys fees and costs incurred in connection with the application. The Court has heard arguments and received pre-and post-hearing briefs and evidentiary submissions. Plaintiffs here are a company that supplied side scan sonar equipment and individuals who contracted to participate in the S.S. Central America search and recovery efforts. Defendants are several companies that were allegedly responsible for or involved in the search and recovery operation or are allegedly successors or alter egos of those companies, as well as several individuals who allegedly are or were parties to certain contracts, or are or were directors or officers of one or more of the

defendant companies.

For the following reasons, the application to vacate the writ of attachment is granted as to all defendants other than Economic Zone Resources Associates, Inc. ("EZRA"), Recovery Limited Partnership ("RLP"), Columbus Exploration LLC, ("CXLLC"), and Thomas G. Thompson. The motion to dismiss the complaint is denied.

DISCUSSION

This is a matter invoking the admiralty jurisdiction of the Court. Defendants seek vacatur of the writ of attachment pursuant to Admiralty Supplemental Rule E(4)(f). "Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to [the property owner] a prompt post-seizure hearing at which [the property owner] can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings." Fed. R. Civ. P., Adm. Supp. R. E(4)(f), Advisory Committee's Note. The Second Circuit has expounded upon the Rule E(4)(f) inquiry, ruling that an attachment should issue only if a plaintiff establishes four factors: (1) that the plaintiff has a valid prima facie admiralty claim against the defendant; (2) that the defendant cannot be found within the district; (3) that the defendant's property may be found within the district; and (4) that there is no statutory or maritime law bar to the attachment. Aqua Stoli Shipping Ltd. v. Gardner

Smith Pty Ltd., 460 F.3d 434, 445 (2d Cir. 2006). Before examining Plaintiffs' arguments for the validity of their writ of attachment as to particular defendants, the Court will consider Defendants' arguments for vacatur of the writ in its entirety.

Application to vacate Order and Writ in their Entirety

The first issue under the Aqua Stoli standard is whether plaintiff has shown that it has a valid prima facie admiralty claim against the defendant. The standard most commonly applied in a Rule E(4)(f) analysis is that the plaintiff must demonstrate that "reasonable grounds" exist for the attachment. Ullises Shipping Corp. v. FAL Shipping Co., 415 F. Supp. 2d 318, 322-23 (S.D.N.Y. 2006), overruled on other grounds by Aqua Stoli, 460 F.3d at 445.

Defendants' principal argument as to this prong of the standard rests on choice of law clauses in the side scan sonar lease and non-disclosure agreements on which plaintiffs rely. Specifically, a contract pursuant to which Defendant RLP leased a side scan sonar from Plaintiff International Deep Sea Survey, Inc. ("IDSS") provides that the contract is to be construed in accordance with the internal laws of the State of Ohio. Substantially the same language appears in a number of non-disclosure agreements prohibiting certain plaintiffs from competing with certain defendants during the

search and recovery operations for the S.S. *Central America*. Defendants contend essentially that the provisions choosing internal laws of the state of Ohio negate any potential applicability of federal maritime law to the parties' disputes and, thus, preclude maritime jurisdiction of the issues raised in this action. The Supreme Court, in Norfolk Southern Railway Co. v. James N. Kirby Pty Ltd., 543 U.S. 14, 24 (2004), made it clear, though, that admiralty jurisdiction of a contract claim is determined based on the nature and character of the contract rather on any than choice of law provision. 543 U.S. 14, 24 (2004). Here, the sonar and non-disclosure agreements were by their terms entered into in connection with maritime commercial venture and are therefore maritime in nature; thus, the Court has jurisdiction of the claims brought thereunder pursuant to 28 U.S.C. § 1333. The choice of law clauses, whatever their significance in the ultimate determination of the merits of the dispute, do not divest the federal court of subject matter jurisdiction. Accordingly, Plaintiffs have met their prima facie burden of demonstrating that they have asserted valid admiralty claims.

Defendants also argue that the order and writs of attachment should be vacated because Plaintiffs have failed to give them prompt notice of the attachments as required by Supplemental Rule B. Here, the record demonstrates that notice of the actual attachments achieved pursuant to the writ has been given promptly upon Plaintiffs becoming

aware of the attachment of particular assets. This is sufficient compliance with the notice requirement of Supplemental Rule B.

In addition to vacatur based on a plaintiff's failure to satisfy the requirements of Rules B and E, vacatur "is appropriate in other limited circumstances." Aqua Stoli, 460 F.3d at 445. These include, for instance, where another alternative (i.e., adjacent) convenient forum is available. Id. Here, however, there is no adjacent convenient district with jurisdiction over all of the parties. Nor does any of the other bases for vacatur that are delineated in Aqua Stoli warrant vacatur here. See Aqua Stoli, F.3d at 445.

The Court will examine, *infra,* the extent to which Plaintiffs have demonstrated that they have a reasonable basis for asserting these claims against particular defendants.

Application to Vacate as Against Particular Defendants

The non-disclosure agreements ("NDAs") at issue in this case, which were executed by Defendant Thompson, recite that Thompson was acting for himself and "interests, in addition to his own, of certain other science professionals and individuals, including one or more entities." (e.g., Supplemental Shirley Aff., Ex. H). The agreements do not further identify any of these individuals or entities. Id.

Plaintiffs assert that the other individual

defendants are among those for whom Thompson was acting in executing the NDAs. In support of this contention, Plaintiffs proffer their attorney's iteration, purportedly composed in the year 2000, of a statement purportedly made to him and a deceased plaintiff by Thompson in 1999, to the effect that "at the time the non-disclosure agreements were executed by the deceased plaintiff and the members of his group, and subsequently when he responded to their questions regarding interpretation of those agreements, [Thompson] had authority to speak for all the investors, partners and other interests in the treasure." (Shirley Aff. at 10, October 23, 2006). This statement, which neither identifies the defendants whose assets have been attached here as parties to the agreement nor even asserts directly that Mr. Thompson intended to bind them as individuals to the NDAs, and was authorized to do so, is insufficient to constitute the requisite Aqua Stoli showing of a prima facie admiralty claim against the defendants other than Thompson with respect to the NDAs. The verified complaint's assertion, at paragraph 54, that Thompson was acting for all of the other defendants in entering into the NDAs adds nothing by way of evidentiary support to Plaintiffs argument, in that the complaint is verified by Plaintiffs' attorney. The individual Defendants have proffered affidavits in support of their vacatur application in which they specifically deny any contractual relationship with Plaintiffs and

deny that Thompson was authorized to bind them under the NDAs.

Plaintiffs' allegations regarding the liability of the other corporate entities are supported merely by generalized assertions in the attorney-verified complaint in this action, unsworn court filings in related actions, and documentation showing common business addresses and management. On this record, Plaintiffs' showing is insufficient to make out the requisite prima facie admiralty claim based on the NDAs against the defendants other than Thompson and, for the reasons explained in the following paragraph, RLP, EZRA, and CXLLC.

Plaintiffs proffer some evidence that RLP and EZRA were involved in the performance of the NDAs. For example, some of the NDAs were printed on EZRA letterhead, and some instructions regarding the NDAs were issued in the name of P. These proffers further indicate that Mr. Thompson was the general partner of RLP and the president of EZRA. Plaintiffs' showing is sufficient at this stage to demonstrate the existence of a prima facie admiralty claim based on the NDAs against Mr. Thompson, RLP and EZRA. In that Plaintiffs have also proffered evidence that CXLLC has assumed RLP's liabilities, Plaintiffs showing is sufficient to sustain the writ of attachment as against CXLLC as well. Based on their proffers concerning CXLLC's responsibility for RLP's liabilities, Plaintiffs' showing is also sufficient as against RLP and CXLLC with respect to their claim based on RLP's lease of the

side sonar scanning equipment from IDSS.

The remaining Aqua Stoli factors have also sufficiently been addressed as to these defendants. Defendants do not argue that they may be found within the district. Moreover, Defendants' property has been found and attached in the district, and they have not raised a valid statutory or maritime law bar to the attachment.

The challenged attachment is also based, in part, on a penalty wage claim asserted by the Estate of deceased Plaintiff Craft pursuant to 46 U.S.C. § 10504 against Defendant Kirk "and some or all of the remaining Defendants" for an unpaid recovery-percentage portion of Craft's NDA compensation. Section 10504 renders a vessel "master or owner" liable for two days' wages for each day a wage payment is delayed. Plaintiffs have proffered no evidence of ownership or master status as to the vessel of any of the named defendants other than Kirk. As to Kirk, they proffer only a hearsay statement in a book titled *Ship of Gold in the Deep Blue Sea*. Kirk has tendered an affidavit denying that he owned the vessel. On this record, Plaintiffs have failed to make the required Aqua Stoli showing as to the Craft Estate's wage claim and the writ of attachment is accordingly vacated insofar as it secures that claim.

The remainder of Plaintiffs arguments for the propriety of the attachment of the assets of the defendants other than Thompson, EZRA, RLP and

CXLLC are premised on veil-piercing arguments and/or arguments that the individual Director Defendants are liable on Plaintiffs claims because they have mismanaged CXLLC's affairs. As evidentiary support for these assertions, Plaintiffs proffer the aforementioned documentation of overlapping business addresses and personnel, as well as unswom court filings from related actions in which investors in the various entities allege that the individual defendants have failed to observe corporate formalities as to director elections for CXLLC, have refused to provide access to books and financial records of the companies, have refused to disclose the status and value of the recovered treasure, and have failed to make payments allegedly required by the various agreements relating to the investments and the recovery operations. Plaintiffs' proffers of facts, allegations and inferences that might, if proven, support findings of mismanagement, breach of duty to investors and, possibly, use of certain corporate entities for the benefit of others, are insufficient at this stage to demonstrate that Plaintiffs have the requisite prima facie admiralty claim against any defendants other than Thompson, EZRA, RLP and CXLLC.

CONCLUSION

Accordingly, the original and amended orders authorizing the issuance of writs of attachment are hereby vacated as against all Defendants other than Thompson, EZRA, RLP and CXLLC. All assets of

any of the other Defendants shall immediately be released and no further attachments pursued as to such other Defendants.

The motion to dismiss the complaint, which is not addressed to any substantive degree in Defendants' papers, is denied.

Defendants' request for a hearing as to the amount of the security attached implicates an issue that goes ultimately to the merits of the case. Plaintiffs have done enough at this stage to support the amount of the attachment by proffering the figures cited in the pleadings and raising issues as to the unavailability of accounting records. The request for a hearing is denied.

Defendants' Rule 11 application for attorneys' fees, costs, and damages, is denied as the procedural requirements of the Rule have not been satisfied. Defendants have demonstrated no other grounds warranting an award of fees, costs of damages.

SO ORDERED

Dated: New York, New York
January 16, 2007

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge